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Case No. 89-1750

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1989

LOCAL 4501, COMMUNICATIONS WORKERS OF AMERICA,

Petitioner,

v.

THE OHIO STATE UNIVERSITY, et al.,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Ohio

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ANTHONY J. CELEBREZZE, JR.
ATTORNEY GENERAL,
STATE OF OHIO
By: ELIZABETH M. STANTON,
COUNSEL OF RECORD
PHILIP R. MOOTS
WANDA L. CARTER
Special Counsel
MOOTS, COPE, STANTON & KIZER
A Legal Professional Association
3600 Olentangy River Road
Columbus, Ohio 43214-3913
(614) 459-4140
Counsel for Respondents

BECKER GALLAGHER LEGAL PUBLISHING, INC., CINCINNATI, OHIO (513) 621-2880

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QUESTION PRESENTED FOR REVIEW

Does the Due Process Clause of the Fourteenth Amendment to the United States Constitution guarantee a classified civil service employee the right to have a stenographic record or tape recording made of a pretermination hearing when the employee has a right to a *de novo* full evidentiary hearing post-termination?

LIST OF PARTIES

Respondents are satisfied with the List of Parties set forth in the Petition for Writ of Certiorari. However, the groups listed as "Related Parties" were not parties to the proceedings in the Ohio Supreme Court or to the proceedings in the lower state courts and, therefore, are not proper parties before this Court.

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OPINIONS BELOW

The citation to the opinion of the Supreme Court of Ohio is properly set forth in the Petition for Writ of Certiorari. The citations for the unreported lower court opinions in this case are as follows:

Local 4501, Communications Workers of America v. *The Ohio State University, et al.*, No. 87AP-902 (Ct. App., 10th App. Dist. Ohio Aug. 11, 1988); and

Local 4501, Communications Workers of America v. *The Ohio State University, et al.*, No. 87CV-01-623 (Ct. C. Pleas, Franklin Cty., Ohio Sept. 3, 1987).

These unreported decisions are reprinted in the Petitioner's Supplemental Appendix at 38-50.

JURISDICTION

Respondents are satisfied with the statement of jurisdiction set forth in the Petition for Writ of Certiorari.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS

The only constitutional provision involved in the question presented for review is Section 1 of the Fourteenth Amendment to the United States Constitution. No state constitutional provisions, statutes, or regulations are involved.

> § 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

STATEMENT OF THE CASE

Respondent cannot accept Petitioner's Statement of the Case. Petitioner's Statement of the Case is more in the form of a summary of Petitioner's argument.

Petitioner filed with the Court of Common Pleas of Franklin County, Ohio a complaint for declaratory judgment requesting that court to declare that

> The policy of The Ohio State University in refusing to permit a record to be made [through videotape, stenographic means, tape recording and/or other method of preserving testimony] is unlawful, unenforceable and void and contrary to the provisions of The Ohio and Federal Constitutions in that it deprives employees of due process of law. Plaintiff further requests judgment declaring the rights and obligations of the parties in conducting disciplinary hearings. . . .

Petitioner's Appendix at 34. Respondents moved to dismiss said complaint on numerous grounds emanating from state law and, in addition, on the ground that there is no federal constitutional due process right to tape record or record by stenographic means a pretermination "hearing." This was the only alleged constitutional due process deprivation.

There was no factual dispute that the pretermination "hearings" being conducted were in all other respects in full compliance with this Court's previous decision in *Cleveland Board of Education* v. *Loudermill*, 470 U.S. 532 (1985). Petitioner, in documents filed with the trial court, set forth facts showing that note taking at such hearings was permitted. Petitioner's Appendix at 36-37.

The court of common pleas converted the motion to dismiss into a motion for summary judgment and granted said motion. In so doing, the court held that "no constitutional right to recording a pre-termination hearing exists." Petitioner's

Supplemental Appendix at 47. The court of common pleas further ruled that, "[u]pon consideration of the uncontroverted factual issues, the Court must conclude as a matter of law, that plaintiff's action must be dismissed." Petitioner's Supplemental Appendix at 48.

Petitioner appealed the decision to the Ohio Court of Appeals, Tenth Appellate District. In that appeal, petitioner raised only one assignment of error, as follows:

> The Court of Common Pleas committed reversible error by dismissing the action by finding that civil service employees are not entitled to preserve the testimony given at a pre-termination hearing.

Petitioner's Supplemental Appendix at 38. In affirming the court below, the court of appeals held as follows:

> Neither *Loudermill, supra,* nor recent case law requires a record to be made of a pre-termination hearing and we do not find plaintiff to be entitled to such a hearing by the Due Process Clause of the United States Constitution. The government's interest in the efficient dismissal of an employee for misfeasance, malfeasance or nonfeasance in office under R.C. 124.11 is not outweighed by the highly speculative possibility of the employer's fabrications and avoidance of arbitrary decisions which a record will not necessarily eradicate and for which post-termination procedures are available, specifically, in this instance, binding arbitration, at which all evidence may be examined *de novo.*

Petitioner's Supplemental Appendix at 43.

Petitioner then moved the Ohio Supreme Court to take jurisdiction. The Ohio Supreme Court granted said motion and heard Petitioner's appeal. Petitioner set forth only one proposition of law in its appeal to the Ohio Supreme Court:

> Due process of law guarantees a classified civil service employee of the state of Ohio [the right] to preserve

testimony presented by the appointing authority and himself at a pretermination disciplinary hearing.

Petitioner's Appendix at 4. On February 7, 1990, the Ohio Supreme Court rendered its opinion and judgment affirming the decision of the court of appeals. Petitioner's Appendix at 1-13. The Ohio Supreme Court held as follows:

> We agree with the conclusion of the court of appeals that, "[a]ccordingly, there is no compelling necessity for preserving the evidence received at the pre-termination hearing since a full *de novo* hearing is afforded either by binding arbitration pursuant to a collective bargaining agreement or by appeal to the State Personnel Board of Review whichever may be applicable." We hold that a classified civil service employee of the state of Ohio must be afforded a pretermination disciplinary hearing; however, such hearing need not be elaborate, but must afford the employee the opportunity to have an explanation of the employer's charges and evidence againt him, and an opportunity to present his side of the story. *Cleveland Board of Education* v. *Loudermill, supra,* applied and followed.
>
> However, as found by the trial court and the court of appeals, we also hold that a classified civil service employee of the state of Ohio does not have a constitutional due process right to have a stenographic record or tape recording made of a pretermination hearing.
>
> The court of common pleas properly granted summary judgment in this case, and the court of appeals properly affirmed, on the basis that there exists no constitutional right to preserve evidence at a pretermination hearing.

Petitioner's Appendix at 10-11.

SUMMARY OF ARGUMENT

The process that is due a state civil service employee prior to termination has been determined by this Court in its decision in *Cleveland Board of Education* v. *Loudermill,* 470 U.S. 532 (1985). In that case, this Court balanced the interests of both the employer and employee and determined that the employee is entitled to notice of the employer's charges, an explanation of the employer's evidence, and an opportunity to present his or her side of the story. This Court did not require an elaborate full evidentiary hearing where an employee has an opportunity for a full evidentiary *de novo* hearing post-termination.

Petitioner has set forth none of the grounds enumerated in Supreme Court Rule 17 in support of its Petition for Certiorari. Furthermore, Petitioner has set forth no reasons why this Court should review or expand upon its decision in *Loudermill.*

The ability to preserve testimony by tape recording or stenographic means, which Petitioner seeks to impose as a constitutional requirement, would serve neither the interests identified by this Court nor the concerns identified by Petitioner. Were such an expansion of the *Loudermill* requirements granted, the competing interests that were carefully weighed in *Loudermill* would cease to balance.

Accordingly, it is Respondents' position that the Petition for Writ of Certiorari should be denied.

ARGUMENT

The Ohio Supreme Court in its decision in this case applied and followed this Court's decision in *Cleveland Board of Education* v. *Loudermill*, 470 U.S. 532 (1985). In that case, this Court fully reviewed and considered the pretermination due process rights of a classified civil service employee in the State of Ohio and held that "the pretermination 'hearing,' though necessary, need not be elaborate" and that "[i]n general, 'something less' than a full evidentiary hearing is sufficient prior to adverse administrative action." *Id.* at 545.

Elaborating on its holding, this Court set forth the requirements for a pretermination hearing as follows:

> The essential requirements of due process, and all that respondents seek or the Court of Appeals required, are notice and an opportunity to respond. The opportunity to present reasons, either in person or in writing, why proposed action should not be taken is a fundamental due process requirement. [citation omitted]. The tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story. [citations omitted]. To require more than this prior to termination would intrude to an unwarranted extent on the government's interest in quickly removing an unsatisfactory employee.

Id. at 546. This Court further concluded,

> all the process that is due is provided by a pretermination opportunity to respond, coupled with post-termination administrative procedures as provided by the Ohio statute.

Id. at 547-48.

While the issue of pretermination due process rights of classified civil servants is an important question of federal constitutional law, that question has been fully reviewed and

determined by this Court in its *Loudermill* decision in which the constitutionally required due process framework for pretermination hearings for classified civil service employees was clearly and definitively established. It is apparent from that decision that the process that is due a public employee prior to termination consists of notice of the charge against the employee, an explanation of the employer's evidence, and an opportunity for the employee to be heard. This Court determined that no formalized or elaborate process for satisfying those requirements is mandated by the United States Constitution. The role of the state courts and lower federal courts now is to apply these requirements to the facts on a case-by-case basis to determine if the constitutionally mandated procedures were satisfied.

Respondents certainly agree that a balancing of interests is necessary and appropriate in determining what process is due a person who is to be deprived of a property interest. However, the pretermination process due a public employee who has a property interest has already been the subject of such analysis by this Court in *Loudermill*. This Court balanced the following interests in that case: the private interest in retaining employment, the governmental interests in expeditious removal of unsatisfactory employees and the avoidance of administrative burdens, and the risk of an erroneous termination. After weighing those interests, this Court determined the due process constitutionally required in such circumstances. In addition, and as a part of that balancing analysis, this Court addressed the purpose of the constitutionally required pretermination "hearing." This Court found that it is not designed to provide for a definite resolution of the factual or legal issues involved in a termination. Rather, this Court held that the pretermination hearing is

> an initial check against mistaken decisions — essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action.

Loudermill, 470 U.S. at 545-46. The fact that classified civil service employees have an opportunity, post-termination, for a more trial-like hearing at which to challenge their terminations, both factually and legally, was viewed as an important variable in assessing the adequacy of the pretermination "hearing." The Court specifically noted that "our holding rests in part on the provisions in Ohio law for a full post-termination hearing." *Id.* at 546.

In the case *sub judice*, the post-termination opportunity for a full evidentiary *de novo* hearing is likewise available to Petitioner's member employees. As the Ohio Supreme Court found,

> In essence such provisions [in the collective bargaining agreement] provide full post-termination hearing rights to the plaintiff employees through impartial binding arbitration. Thus, it is the arbitration hearing, not the pretermination hearing, that is the equivalent of the State Personnel Board of Review hearing. As provided by the agreements between the parties, a record of the arbitration hearing is allowed.

Petitioner's Appendix at 8-10. Therefore, under Ohio law the employees who are the subject of the present case have, as did the employees in the *Loudermill* case, full post-termination *de novo* hearing rights.

In requesting this Court to grant its Petition for Certiorari, Petitioner has set forth none of the grounds enumerated in Supreme Court Rule 17. Subparagraph 1(a) of the Rule refers to cases heard by a federal court of appeals and, therefore, is not applicable to this case.

Subparagraph 1(b) of the Rule refers to conflict between two state courts of last resort or between a state court of last resort and a federal court of appeals with regard to the determination of a federal question. Petitioner has cited no case decided by either another state court of last resort or a federal

court of appeals which conflicts with the decision of the Ohio Supreme Court in this case. Therefore, subparagraph 1(b) is not applicable.

Subparagraph 1(c) of the Rule refers to situations where a state court or a federal court of appeals has either decided an important question of federal law which has not been, but should be, settled by this Court or has decided a federal question in a way that conflicts with applicable decisions of this Court. The question presented in the Petition for Certiorari, that is, the pretermination due process rights of classified civil service employees in the state of Ohio, has clearly been settled by this Court. Those rights were determined in this Court's decision in *Loudermill*. The Ohio Supreme Court applied and followed this Court's decision in *Loudermill*. Petitioner has not alleged, nor could it, that the Ohio Supreme Court decision is in any way in conflict with this Court's *Loudermill* decision. Therefore, subparagraph 1(c) also is not applicable.

Furthermore, Petitioner has cited to this Court no cases that would indicate that the lower federal and state courts have been in conflict in their interpretation of this Court's *Loudermill* decision. Nor has Petitioner cited any cases which demonstrate less than a clear understanding or consistent application of that decision.

On remand of the *Loundermill* case, the Sixth Circuit Court of Appeals, in affirming the decision of the district court, measured the process that had been afforded Mr. Loudermill against the due process requirements set forth in this Court's decision:

> Thus, the issue is whether the meeting between Loudermill and Roche gave Loudermill adequate notice of the charges against him and an opportunity to respond thereto. In examining the facts of this case, it is clear that these requirements were satisfied.
>
> . . . .
>
> . . . Indeed, courts construing the Supreme Court's

> language in *Loudermill* have required only the barest of a pretermination procedure, especially when an elaborate post-termination procedure is in place.
>
> . . . .
>
> Since Loudermill received adequate notice of the charges against him, saw the Board's evidence, and was offered several days to respond, the district court correctly concluded that Loudermill received a pretermination hearing which satisfied the requirements of procedural due process.

Loudermill v. *Cleveland Board of Education*, 844 F.2d 304, 311-12 (6th Cir. 1988).

In the case *sub judice*, the trial court found the facts to be uncontroverted. Petitioner's Supplemental Appendix at 48. There is no factual dispute in this case as to the Respondents' full compliance with this Court's *Loudermill* decision, that is, notice, an explanation of the employer's evidence, and an opportunity for the employee to present the employee's side of the story. Petitioner is seeking a revisit to and expansion of *Loudermill*. However, it has stated no reason why this Court should so act.

Petitioner's asserted constitutional right to record by stenographic means or tape recording what occurs at a pretermination "hearing" does not comport with or enhance the purpose of the constitutionally required pretermination "hearing." As this Court stated in *Loudermill*, the purpose of affording an employee the opportunity generally referred to as a "hearing" is not to resolve definitively the factual legal issues involved in a termination. Rather, it provides an initial check against mistaken decisions by allowing an opportunity for the employee, informed of the charge and evidence against him or her, to tell his or her side of the story.

The recording or transcription of the employee's own statement would have no impact on this opportunity nor would it

somehow enhance the important "initial check." Despite the fact that this Court in *Loudermill* very clearly did not require a trial-like evidentiary hearing prior to termination, it appears that Petitioner's goal in this action is not really the creation of a record of the *Loudermill*-required "hearings," but an attempt to have this Court expand the constitutionally required pretermination procedure to include a full trial-like evidentiary hearing.

Petitioner sets forth several reasons why an employee's due process rights are violated when an employee is not permitted to make a record of the pretermination "hearing." The Petitioner asserts the pretermination "hearing" requires that: an employee is entitled "to have the evidence presented against him or in his favor"; the "evidence [must be] preserved"; the preservation is to be by "stenographic record or a recorder (video or tape)"; the pretermination hearing must be of such an extensive nature as to meet the subjective test "that the employee knows" that the employee has been dealt with fairly; and "testimony" and "testimony or evidence" must be taken including the testimony of "other employees." Petition at 7-10.

Petitioner's discussion of the asserted importance of the preservation of evidence and testimony belies the reality of what a pretermination "hearing" actually is. The rationale offered in support of Petitioner's position contemplates a pretermination hearing that is a full evidentiary hearing wherein testimony is taken from both sides. The Petitioner presumes that the "hearing" is a very formal event at which the employer does not simply inform the employee of the employer's evidence but at which the employer's evidence is presented by way of sworn testimony and cross-examination. The reasons advanced for requiring such a record of pretermination "hearings" contemplate an event that could not, for example, occur in a manager's office in the normal course of business.

The only testimony and the only evidence required at a

pretermination "hearing" is the notice to the employee of the charges against him or her, an explanation to the employee of why the employer is bringing the charges, and an opportunity for the employee to tell his or her side of the story. There is no requirement that witnesses be called, testimony be given, cross-examination be allowed, or documents be put into evidence by the employer at that time. The employer listens to the employee's explanation and determines whether or not there are "reasonable grounds" to believe that the charges against the employee are true and support a termination. *Loudermill*, 470 U.S. at 545-46.

This Court, after a careful balancing of interests in *Loudermill*, determined what process was due a civil service employee prior to termination. The process due is not a full evidentiary hearing. As did Loudermill, Petitioner's members have the right to a full *de novo* evidentiary hearing post-termination. The recording or taping of the employee's own statement as to why he or she should not be terminated would not help avoid future fabrication of testimony or evidence nor would it help avoid mistaken decisions. Once the employer has heard the employee's statement, the employer then determines whether or not to discipline the employee. If the employee believes the decision is mistaken, he or she has a remedy. The remedy is a full evidentiary post-termination hearing before an impartial decision maker at which the employer has the burden of proof.

Goldberg v. *Kelly*, 397 U.S. 254 (1970), cited by Petitioner in support of its position, is inapposite. In *Goldberg*, which involved the termination of welfare benefits, the Court pointed out that there were significantly different considerations in the welfare termination context than are present in the context of public employment. *Id.* at 264. The Court thereby clearly limited its decision to the termination of welfare benefits by specifically stating that the rationale underlying its decision did not apply to the situation of discharged employees.

In this Court's *Loudermill* decision, issued some fifteen years after *Goldberg*, this Court distinguished *Goldberg* by agreeing with *Goldberg* that, "that case presented significantly different considerations than are present in the context of public employment." *Loudermill*, 470 U.S. at 545. This Court in *Loudermill*, therefore, declined to adopt for employment termination cases the more elaborate hearing procedures required for the termination of welfare benefits. This Court found that a pretermination "hearing" in the employment arena "should be an initial check against mistaken decisions," *Id.*, and that a terminated employee is not entitled to a full evidentiary hearing pretermination when that employee has full post-termination hearing rights. More recently, in *Brock* v. *Roadway Express, Inc.*, 481 U.S. 252 (1987), this Court affirmed its continuing recognition of the differences in due process requirements for the welfare and employment arenas and affirmed its continuing reliance upon *Loudermill*.

The *Loudermill* due process requirements have been the subject of numerous state court, federal district court and federal circuit court of appeals cases in which those courts have reviewed factual circumstances to determine their compliance with *Loudermill*. Those cases demonstrate the numerous diverse pretermination situations that arise and how this Court's *Loudermill* decision has been interpreted to protect the employee's rights. Those cases also show how the imposition of a requirement to tape record or record by stenographic means the pretermination "hearing" would either be completely ineffectual or would intrude to an unwarranted extent upon the government's interest in quickly removing an unsatisfactory employee.[1] The sound bases for

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[1] *See, e.g., Deryck* v. *Akron City School District*, 633 F. Supp. 1180 (N.D. Ohio 1986) (due process requirements met when plaintiff had opportunity to meet with supervisor to present his position prior to being terminated; the court held such pretermination meeting, which allowed supervisor to fully consider merits of plaintiff's position, was constitutionally adequate and complied with *Loudermill* requirements); *Lovvorn* v. *City of Chattanooga, Tennessee*, 647 F. Supp. 875 (E.D. Tenn. 1986) (fire fighters

these representative decisions — and the myriad of other decisions that comport with them — should not be called into question by revisiting *Loudermill*.

Petitioner cites Ohio constitutional, statutory and ad-

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afforded adequate due process where permitted to explain their side of the story to fire chief prior to their termination; the court noted that such procedure was adequate because fire fighters were also given full post-termination hearings); *Riggins* v. *Board of Regents of University of Nebraska*, 790 F.2d 707 (8th Cir. 1986) (pretermination procedures were constitutionally adequate where discharged employee was given a detailed written report regarding her misconduct, was permitted to add comments to the report, and was allowed to further present her side of the story; the court noted that pretermination procedure did not have to be elaborate, because more elaborate post-termination procedure existed even though employee did not take advantage of it); *Buschi* v. *Kirven*, 775 F.2d 1240 (4th Cir. 1985) (supervisor complied with the requirements of due process where, prior to discharging certain employees, he sought out the employees and offered to meet with them individually to give each an opportunity to be heard on the grounds for which they were being terminated; this procedure was constitutionally adequate even though the employees chose not to take advantage of those interviews); *Kelly* v. *Smith*, 764 F.2d 1412 (11th Cir. 1985) (discharged city utility department employee afforded adequate pretermination procedures where supervisor orally asked him why he was not available for stand-by duty the previous evening, the employee was given an opportunity to respond, and the employee was informed that unless he agreed to work stand-by he would be terminated; court found that these procedures gave employee notice of the charge and an opportunity to explain his position and retain his job and that said oral notice and opportunity to respond orally were sufficient to meet *Loudermill* requirements); *Brasslett* v. *Cota*, 761 F.2d 827 (1st Cir. 1985) (discharged fire chief was afforded constitutionally adequate pretermination hearing where he met with city manager to discuss possible disciplinary actions for his past conduct; the court found that at the meeting he was notified of possibility of discharge and was afforded ample opportunity to defend actions and rebut any allegations).

Compare Fairley v. *Ohio State Personnel Board of Review*, 29 Ohio App. 3d 113, 504 N.E.2d 75 (1986) (discharged employee had not been afforded constitutionally adequate pretermination procedures where the employee had no knowledge whatsoever, prior to receipt of termination notice, that his employment was endangered and, therefore, he was discharged without notice or an opportunity to respond.

ministrative provisions in its Petition. These provisions are not relevant to the question before this Court. The Ohio Supreme Court fully reviewed these issues and found no violation of Ohio constitutional, statutory or administrative law. It found that the employees in question are entitled to a full *de novo* hearing, which hearing is afforded either by binding arbitration pursuant to a collective bargaining agreement or by appeal to the Ohio State Personnel Board of Review, whichever is applicable. Therefore, the only issue before this Court is whether a classified civil service employee of the state of Ohio who is entitled under Ohio law to a full evidentiary post-termination *de novo* hearing is deprived of a federal constitutional due process right if the employee is denied a stenographic record or tape recording of the pretermination "hearing."

Petitioner's assertion in this case is that

> [t]he constitutional right to a pre-termination hearing carries with it the requirement that the testimony and evidence used to support a decision adverse to the employee must be preserved.

Petition at 13. It is clear from the arguments set forth in support of this position that Petitioner is seeking not simply the preservation of the employee's own statement at the pretermination hearing. Rather, it is seeking an expansion of *Loudermill* to require a pretermination hearing at which all of the employer's and employee's testimony and evidence would be presented through the direct examination and cross-examination of witnesses and the presentation of exhibits, memorialized by a formal record in a formal setting. All of this would occur prior to the employer even making the decision as to whether or not to terminate.

Such an expansion of *Loudermill* "would intrude to an unwarranted extent" upon the employer's right and ability to operate efficiently and to remove quickly an unsatisfactory employee. *Loudermill*, 470 U.S. at 546. It would lead to com-

plete duplication of the post-termination *de novo* hearing to which the employee is entitled under state law. Were such an expansion allowed, the competing interests that were carefully weighed in *Loudermill* would cease to balance.

CONCLUSION

For all the reasons set forth herein, Respondents respectfully urge this Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

ANTHONY J. CELEBREZZE, JR.
ATTORNEY GENERAL, STATE OF OHIO

ORIGINAL SIGNED BY
ELIZABETH M. STANTON

By: ELIZABETH M. STANTON,
COUNSEL OF RECORD
PHILIP R. MOOTS
WANDA L. CARTER
Special Counsel
MOOTS, COPE, STANTON & KIZER
A Legal Professional Association
3600 Olentangy River Road
Columbus, Ohio 43214-3913
(614) 459-4140

Counsel for Respondents

CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari were sent by regular U.S. Mail, first-class postage prepaid to

Francisco A. Garabis
765 South High Street
Columbus, Ohio 43206

this 8th day of June, 1990. All parties required to be served have hereby been served.

ORIGINAL SIGNED BY
ELIZABETH M. STANTON

Elizabeth M. Stanton